2. The said record does not contain the objections and exceptions of Walter S. Field and Madison M. Lindly to the said Tentative Findings of Fact and Opinion of said Court of Claims, of December 7, 1914, which said objections and exceptions were filed in said Court, January 21, 1915, and are found on page one and following pages to the last paragraph on page twenty-five of the printed copy of said objections and exceptions so filed as aforesaid.

3. The said record does not contain Finding XLII relative to the claims of Walter S. Field and Madison M. Lindly, and Finding XLV, relative to the claim of John London and others, and the Conclusion of Law as handed down by the Court of Claims, May 17, 1915.

4. The said record does not contain the Exceptions filed August 16, 1915, on behalf of Walter S. Field and Madison M. Lindly to the Findings of Fact and Conclusion of Law and Opinion handed down by the Court of Claims of the United States, May 17, 1915, with the correction of clerical error in said Exceptions as set forth November 29, 1915.

5. The said record does not contain the proposed Bill of Exceptions on behalf of the said Walter S. Field and Madison M. Lindly, filed with the Court of Claims of the United States for settlement, on August 16, 1915.

6. The said record does not contain so much of the Motion for a New Trial on behalf of Walter S. Field filed in the Court of Claims of the United States, on November 28, 1916, as is found in the printed copy of said Motion for a New Trial, beginning at subdivision 9 on page 4, and ending at the end of subdivision 5 on page 7 and the argument as to the Errors of Law in support of said Motion for a New Trial as the same is found on pages 26 to 35 inclusive of the printed copy of said Motion filed, November 28, 1916, as aforesaid.

7. The said record does not show the names of the Judges constituting the Court of Claims of the United States, on the dates of the respective hearings before said Court in February, 1915, and February, 1916, and at the time of the consideration by the Court of the Motion for a New Trial, filed on behalf of Walter S. Field, November 26, 1916.

Wherefore, the said appellants move the Court under Rule 14, to award a writ of certiorari to be issued and directed to the Chief Justice and Justices of said Court of Claims of the United States, commanding them that, searching the record and preceedings in said cause, they forthwith certify to this Court those parts of the record so omitted as aforesaid.

Dated this 9th day of March, 1917.

GUION MILLER,

Attorney for Appellants.

BRIEF IN SUPPORT OF MOTION FOR CERTIORARI.

1. We ask that the Tentative Findings of Fact and Opinion handed down by the Court of Claims, December 7, 1914, be made part of the record on this appeal in order that the objections and exceptions referred to in Subdivision 2 of this Motion may be understood. These Tentative Findings are referred to and in substance made a part of said objections and exceptions, and the meaning and scope of said objections and exceptions cannot be fully ascertained without an examination of said Tentative Findings.

2. We ask that the portion of the objections and exceptions referred to in subdivision 2 of this Motion be made part of the record on this appeal in order that it may appear of record that Walter S. Field and Madison M. Lindly, through their attorney of record, in due season specifically called the attention of the Court of Claims to the failure and omission of the Court to make findings of fact in regard to certain specific matters established by the evidence, which these appellants deem relavant and material, and necessary to be found in order to enable them to present on appeal the legal questions, arising under the Acts of Reference in this case.

The said objections further show that the appellants, Field and Lindly, requested the Court of Claims to make findings as to such matters, based upon the evidence in the record. These objections and exceptions are referred to in the subsequent Exceptions and Bill of Exceptions referred to in subdivisions 4 and 5 of this Motion and in part form part of said Exceptions and Bill of Exceptions.

The particular purpose of these appellants is to make part of the record these objections and exceptions and the Exceptions and Bill of Exceptions, referred to in subdivisions 4 and 5 of this motion, so as to lay the foundation

for an application to this Court to remand the case to the Court of Claims with instructions to that Court to make findings of fact based upon the evidence in the record relative to the several matters claimed by these appellants to be material and essential facts for the proper presentation of the legal questions involved under the Acts of Reference on this Appeal. Such an application will not be considered by this Court, as we understand the decisions, without it is made to appear that requests for findings of fact as to the matters in question have been previously made to the Court of Claims in due season.

3. We ask that Finding XLII relative to the claims of Field and Lindly, and Finding XLV relative to the claims of London and others, as handed down by the Court of Claims, May 17, 1915, be made part of the record on this appeal in order that it may appear that no substantial change was made in the Tentative Findings of Fact, handed down by the Court, December 7, 1914, so far as these appellants are concerned, and to further show the state of the record at the time of the filing by these appellants of the Exceptions and Bill of Exceptions referred to in subdivisions 4 and 5 of this motion.

4. We ask that the Exceptions, filed on behalf of the appellants, Field and Lindly, on August 16, 1915, referred to in subdivision 4 of this motion, be made part of the record on this appeal, in order that it may appear of record that these appellants, in due season again called the attention of the Court of Claims to the errors and omissions of the Court in failing to find material facts established by the evidence, and duly excepted to the action of the said Court in thus failing and refusing to make such findings, and further excepted to the rulings of the Court in passing upon the materiality and relevancy of evidence, and in construing the Acts of Reference in this case, and that they duly excepted to the Conclusion of Law announced by the Court.

5. We ask that the Bill of Exceptions on behalf of Field and Lindly presented to the Court on August 16, 1915, referred to in subdivision 5 of this motion, be made a part of the record on this appeal in order that it may appear of record that these appellants in due time, requested the Court of Claims to settle a Bill of Exceptions, and tendered to the Court a draft of such exceptions as desired by these appellants, with a synopsis of the evidence in the record tending to prove the facts deemed necessary and material by these appellants to the proper presentation of their appeal to the Supreme Court of the United States.

4 and 5. We further desire to have the matter referred to above under subdivisions 4 and 5 in the record on this appeal, so that it may clearly appear to this Court just what issues were pending before the Court of Claims, so far as the appellants, Field and Lindly were concerned, at the time of the hearing before the Court of Claims in February, 1916.

With these added to the record and the docket entries of the Court of Claims now forming part of the record we believe it will be made to appear clearly to this Court, that at the time of said hearing in February, 1916, the only questions before the Court of Claims so far as Field and Lindly were concerned, were whether under the practice of the Court of Claims a Bill of Exceptions can be asked for and settled by the Court, and if so, whether the proposed Bill of Exceptions was in proper form; and second, the allowance of the appeal theretofore prayed by the said Field and Lindly.

It will thus appear that there was no motion for a New Trial pending on behalf of Field and Lindly, and that no argument was made on their behalf, and that their attorney of record in the Court of Claims, L. A. Pradt, took no part in the argument, and while Guion Miller who was of counsel for Field and Lindly, did appear as of counsel for another intervenor, Katie A. Howe, Executrix, and argued the

motion for a New Trial filed on behalf of the said Howe, no brief was filed or argument made on behalf of the said Field and Lindly except in respect to the question of the right of the said Field and Lindly to have a Bill of Exceptions settled. Yet notwithstanding these facts the Court refused to settle a Bill of Exceptions, and proceeded to make additional Findings of Fact in respect to the said Field and Lindly, one of the members of the Court participating in the making of said Findings of Fact having become a member of the Court since the former argument of the case, and never having had the benefit of the argument of the case, on behalf of the said Field and Lindly, except as such argument was necessarily involved in the argument made by counsel on behalf of Howe in support of the Howe motion for a New Trial. We wish these facts to sufficiently appear of record so as to be in position to file a motion in this Court on behalf of Field and Lindly, to remand the case to the Court of Claims with instructions to that Court to reconsider the Findings of Fact made in regard to the claim of Field and Lindly, and hear argument in their behalf relative to such Findings, for the reason that the present Findings were irregularly and improperly made.

That a Bill of Exceptions is an appropriate and proper form of procedure in the Court of Claims, is shown by the following citations from Supreme Court decisions:

> "Whilst we are of the opinion that the appellants are entitled to have the findings made complete on the points indicated by the interrogatories, either affirmatively or negatively, we do not regard a certiorari as the proper mode to effect the object.
>
> * * * * * * * * *
>
> "If that court (Court of Claims) should refuse, with proper evidence before it, to find a material fact desired by either of the parties, the proper remedy would be to make a request that such findings be made, and to except in case of refusal."
>
> U. S. vs. (Adams) Child, 9 Wall., 661; Book 19, Co. Op. Ed., p. 809.

"The fifth (rule as to appeals from the Court of Claims) permits either party to call for a finding upon special question deemed material to the judgment in the case, and, if refused, to ask this court to pass upon the materiality of the fact alleged, and should it be considered material, to send down for the findings. Such is the construction given the rules in Mahan vs. N. Y., 14 Wall., 112. The object is to present the question here as upon an exception to the ruling of the court below in respect to the materiality of the fact. For that purpose it must have been submitted to the court in a written request as provided in the rule."

Driscoll Case, 131 U. S., Appx., CLIX, Book 24, Co. Op. Ed., p. 596.

"If the Court of Claims refuses to find as prayed, the prayer and refusal must be made part of the record, so that this court can determine whether the question is one so necessary to the decision of the case that it will send it back for such finding."

Mahan vs. U. S., 14 Wall., 109.

The way to make such a refusal a part of the record, is as shown in the two cases cited, by taking an exception and this we submit necessitated bill of exception for the purpose of showing the fact and to complete the record.

"On an appeal, the parties were entitled to have all the facts proved in the case before the court below, in the judgment of the court truly found, and stated in the record, that either deemed material to the decision; and as we have seen, the remedy is ample to correct any mistakes committed, if applied for prior to the hearing in this court."

U. S. vs. Adams, 8 Wall., 654.

The same rule applies to Admiralty cases. In Duncan vs. the Francis Wright, 105, U. S., 583, the Supreme Court held:

"If the Circuit Court neglects or refuses on request, to make a finding, one way or the other, on a question of fact material to the determination of the cause, when evidence had been addressed on the subject, an exception to such refusal presented by a bill of exceptions, may be considered here on appeal."

So too, if the court against remonstrance finds a material fact not supported by any evidence.

"In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial, and in the other that there was some evidence to prove what is found when in truth there was none. Both these are questions of law and proper subjects for review in an appellate court."

Whether or not circumstantial facts

"establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law. * * *

"The inquiry thus presented is as to the legal effects of facts proved, not of the evidence given to make the proof, and the question of practice to be settled is, whether under our rule the judgment of the Court of Claims, as to the legal effect of what may perhaps, not improperly be called the ultimate circumstantial facts in a case, is final and conclusive, or whether it may be brought here for review on appeal. * * *

"To avoid misapprehension in the future we take this opportunity to say that we do not only think such a judgment may be reviewed here, if the question is properly presented, but when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts it is the duty of the court, when requested, to so frame its findings as to put the doubtful question in the record. After that the question is as to the effect of

> of the facts, and when the evidence in a case had performed its part and brought all the facts that have been proved, these facts thus established are to be grouped and their legal effect as a whole determined."
>
> U. S. vs. Puch, 99 U. S., 265.

The intervenors, Field and Lindly, believe that the circumstantial facts requested by them to be found by the Court, are material and necessary for the proper consideration of the legal points which they desire to raise on their appeal. As required by the decisions of the Supreme Court they have made the request for the findings of fact, which the Court of Claims deem immaterial, and the intervenors have duly excepted. The proper and only way by which this situation can be put into the record is by a bill of exceptions.

6. We ask that the portions of the Motion for a New Trial filed on behalf of the appellant, Field, on November 28, 1916, referred to in subdivision 6 of this Motion, be made a part of the record on this appeal, in order that it may appear of record that this appellant continued to call the attention of the Court of Claims to the failure and omission of the Court to include in said findings certain specific facts believed by this appellant to be fully established by the evidence, which he believed to be essential to the proper presentation of his case on appeal, and which, he alleged, it was error on the part of the Court of Claims to omit from the Findings of Fact; and further to show that this appellant assigned as error of law the rulings of the Court in respect to the admissibility of evidence as therein set forth, and in disregarding testimony. And further to show that the attention of the Court of Claims was expressly called to the fact that the Findings of Fact so far as they specially related to the claims of Field and Lindly were improperly and irregularly made, because made by the Court of its own motion when that matter was not pending before the Court,

and when one member of the Court, as then constituted, had not heard any argument on behalf of the said Field and Lindly. And further that an express request, based upon these considerations was made to the Court to allow oral argument in support of this motion for a New Trial, which request was not granted.

It should be noted that at the time of the filing of this motion for a New Trial and action upon it by the Court, still another change had taken place in the personnel of the Court, and a new judge had been appointed who never heard any arguments in the case. It does not appear from the record whether this judge took any part in the consideration of the motion for a New Trial, but we assume he did not, and of course the judge who had retired and who had participated in the hearings did not take part in the consideration of the Motion.

7. We ask that the names of the judges constituting the Court of Claims, at the times of the several hearings before the Court, referred to, be made a part of the record on this appeal, so that the facts referred to above, in the discussion of subdivisions 5 and 6, may clearly appear. We are in doubt as to whether this Court will take judicial notice of the dates of appointment, qualifications, and retirement of justices of the Court of Claims, and out of abundant caution, request that the facts thus requested be officially stated in the Record.

GUION MILLER,

Attorney for Appellants.

AFFIDAVIT IN SUPPORT OF MOTION FOR WRIT OF CERTIORARI.

City of Washington, District of Columbia. } ss.

Guion Miller, being first duly affirmed, deposes and says that he is attorney for the appellants in cases Nos. 926, 927 and 930, October Term of the Supreme Court of the United States, and that he prepared and signed the Motion for a Writ of Certiorari to be issued and directed to the Chief Justice and Justices of the Court of Claims of the United States, above set forth, and that he prepared and signed the Brief in support of said motion, above set forth, and that the facts set forth in said motion and in the Brief in support thereof, are true to the best of his knowledge, information and belief.

This affiant further affirms that before the record in this case was made up, he specifically requested the Clerk of the Court of Claims in making up the record to include therein the following:

1. The Tentative Findings of Facts and opinion handed down by the Court, December 7, 1914.

2. Objections and exceptions of Walter S. Field and Madison M. Lindly to the proposed Findings of Fact, as filed January 21, 1915, beginning at Finding XLII at the bottom of page 4, to the end of page 20.

3. Exceptions filed on behalf of Walter S. Field and Madison M. Lindly, by L. A. Pradt, their attorney of Record, on August 16, 1915, with the correction of clerical error therein as set forth on November 29, 1915.

4. The proposed Bill of Exceptions, on behalf of Walter S. Field and Madison M. Lindly, as presented by L. A. Pradt, their attorney of Record on August 16, 1915.

5. So much of the Motion for a New Trial on behalf of Walter S. Field filed by L. A. Pradt, his attorney of Record, on November 28, 1916, as is found in the printed copy of the same beginning at subdivision 9 on page 4, and ending at the end of subdivision 13 on page 5.

but was informed by the Clerk of said Court that if this was to be done, he should get an order to that effect from the Court of Claims. That thereupon he filed in said Court of Claims the following motion which was not allowed by the Court:

IN THE COURT OF CLAIMS OF THE UNITED STATES.

The Estate of Charles F. Winton, Deceased, and others vs. Jack Amos and others, Known as the Mississippi Choctaws.	No. 29,821

MOTION.

Come now Walter S. Field and Madison M. Lindly, by L. A. Pradt, their attorney of Record, and request the Court to direct the Clerk of this Court in making up the record on appeal in the above entitled cause, to include therein the following:

1. The Tentative Findings of Fact and opinion handed down by the Court, December 7, 1914.

2. Objections and exceptions of Walter S. Field and Madison M. Lindly, to the proposed Findings of Fact, as filed January 21, 1915, beginning at Finding XLII at the bottom of page 4, to the end of page 20.

3. Exceptions filed on behalf of Walter S. Field and Madison M. Lindly, by L. A. Pradt, their attor-

ney of Record, on August 16, 1915, with the correction of clerical error therein as set forth on Nov. 29, 1915.

4. The proposed Bill of Exceptions, on behalf of Walter S. Field and Madison M. Lindly, as presented by L. A. Pradt, their attorney of Record on August 16, 1915.

5. So much of the Motion for a New Trial on behalf of Walter S. Field, filed by L. A. Pradt, his attorney of Record, on November 28, 1916, as is found in the printed copy of the same beginning at subdivision 9 on page 4, and ending at the end of subdivision 13, on page 5.

SUGGESTION.

If this Court should be of opinion that the Objections and Exceptions filed January 21, 1915, above referred to should be set forth in full rather than in part, and that the motion for a new trial filed Nov. 28, 1916, should also be set forth in full rather than in part, we request that this be done.

L. A. PRADT,
Attorney of Record for
Walter S. Field and Madison M. Lindly.

GUION MILLER,
Of Counsel.

This affiant further affirms that he believes the matters and things set forth in the above motion should be made part of the record in this case in order that the cases of the appellants may be fully and fairly presented to the Court.

GUION MILLER.

Subscribed and affirmed to before me, a Notary Public in and for the District of Columbia, this 9th day of March, 1917.

PAULINE M. WITHERS,
[SEAL] *Notary Public, D. C.*

Washington, D. C.,

March 19, 1917.

Hon. JOHN W. DAVIS,
Solicitor General of the United States.

Sir:

Please take notice that on Monday, April 9, 1917, at the convening the Court, or as soon thereafter as the business of the Court will permit, I shall present the above motion to the Supreme Court of the United States, and ask the Court to consider the same.

Very respectfully,

GUION MILLER,
Attorney for Appellants
in Nos. 926, 927 and 930,
October Term, 1917.

I hereby acknowledge service of a copy of the above motion, brief and affidavit, this 19th day of March, 1917.

JOHN W. DAVIS,
Solicitor General of the United States.

We consent to the allowance of the above motion.

WILLIAM W. SCOTT,
Attorney for Appellants in No. 924.

GUION MILLER,
Attorney for Appellants
in Nos. 925, 928 and 929.